



Colin Prince
10 North Post Street, Suite 700
Spokane, Washington 99201
509.624.7606
Attorney for Christopher Merrill

UNITED STATES DISTRICT COURT
Honorable Wm. Fremming Nielsen

United States,

Plaintiff,

v.

Christopher Merrill,

Defendant.

No. 19-cr-152-WFN

Sentencing Memorandum

1 I. INTRODUCTION

2 The Court has seen this case before and will see it again—another mentally-ill
3 defendant suffering addiction issues downloaded immensely disturbing images. And
4 Mr. Merrill justified his downloading the way virtually every child-pornography
5 downloading defendant does: he told himself nobody would know. He never laid a hand
6 on anyone. He never took an inappropriate photograph or filmed an inappropriate
7 video. Mr. Merrill believed he was indulging a fantasy—a twisted fantasy, to be sure—
8 without harming anyone else.

9 His actions were illegal, and Mr. Merrill will receive a harsh sentence. And the
10 mandatory minimum (a poor name for a sentence that is anything but minimal) is
11 harsh.

12 In contrast, the government apparently intends to recommend a guideline
13 sentence (as the plea agreement reflects).¹ In doing so, the government will rightly note
14 that Mr. Merrill did this twice. He downloaded child pornography, then federal agents
15 executed a search warrant in February 2018, and then a year and a half later, before
16 being charged, Mr. Merrill did it again.² (It remains unclear why agents did nothing
17 with the case for 18 months.) That fact attests to two things: (1) Mr. Merrill had no
18

19 ¹ See ECF No. 64 at 7 (“The United States agrees to recommend a sentence within the advisory
guideline range . . .”).

² See PSR ¶¶ 17–20.

1 idea how agents tracked him; and (2) Mr. Merrill didn't understand that he was
2 harming others by downloading.

3 The odd thing about a guideline sentence is that not even the Sentencing
4 Commission believes in the child-pornography guidelines anymore—the Commission
5 itself has disavowed them.³ And with good reason. Mr. Merrill's guideline range is 151–
6 188 months. If Mr. Merrill had hired a hitman to kill a child rather than download
7 images, he couldn't be sentenced to that much time—he would face a maximum of 10
8 years.⁴ The guidelines and mandatory minimums are nothing more than the product of
9 tough-on-crime politicians scoring political points on the backs of criminal defendants,
10 people who will serve unjust and unnecessarily long sentences that neither rehabilitate
11 the offenders nor aid the victims. These are the sentences that have made America the
12 world-leader in incarcerating its own people. And we are no safer for it.

13 Five years is a long time. Mr. Merrill respectfully requests that the Court impose
14 a 60-month sentence followed by 5-years supervised release.

15 II. BACKGROUND

16 Not much needs to be added to the PSR's background. Mr. Merrill's story is
17 simple: he grew up relatively normal, athletic, with friends. But sports began to fall
18

19 ³ See *U.S. v. Jenkins*, 854 F.3d 181, 189–90 (2d Cir. 2017) (“the Commission has effectively
disavowed § 2G2.2”).

⁴ See 18 U.S.C. § 1958.

1 away early, and he turned to drug use in his teens in what was most likely also the early
2 onset of mental-health problems. Mr. Merrill has suffered nearly a decade of
3 depression, “normalized anxiety” (i.e., he’s in a constant state of panic), and
4 schizophrenic symptoms—hearing non-existent voices in his head.⁵ And like many
5 people suffering mental-illness, he buried his symptoms in drugs (and likely
6 exacerbated them at the same time). The most serious drug being, unsurprisingly,
7 methamphetamine.

8 One notable fact arises about Mr. Merrill’s drug history: he got clean from 2001
9 until after his divorce in 2012.⁶ After his divorce, Mr. Merrill spiraled downward into
10 daily drug use and depression and downloading.

11 III. DISCUSSION

12 At sentencing, courts may impose only what is necessary to achieve the
13 Sentencing Reform Act’s goals—and nothing more. *U.S. v. Ressam*, 679 F.3d 1069,
14 1089 (9th Cir. 2012) (“[a] substantively reasonable sentence is one that is ‘sufficient,
15 but *not greater than necessary*’”) (quoting 18 U.S.C. § 3553(a) (emphasis added)).

16 A. The child-pornography guidelines are useless.

17 The child-pornography guideline, § 2G2.2, isn’t worth the paper it’s printed on.
18 Although guideline ranges must be considered, courts “may *not presume* that the

19 ⁵ See PSR ¶ 71.

⁶ See PSR ¶ 77.

1 Guideline range is reasonable,” *Gall v. U.S.*, 552 U.S. 38, 49–50 (2007); instead, courts
2 are “free to make [their] own reasonable application of the § 3553(a) factors, and to
3 *reject* (after due consideration) the advice of the Guidelines” — which should not have
4 “any thumb on the scales.” *Kimbrough*, 552 U.S. 85, 113 (2007) (Scalia, J., concurring)
5 (emphasis added). If there was ever a guideline meriting rejection (and there are more
6 than a few), it is § 2G2.2.

7 It is based on nothing. Not research about recidivism. Not any investigation into
8 rehabilitation. Not any considered expertise about the relative harm of the offense.
9 Virtually every enhancement applies in every case, compelling the question: what are
10 the enhancements distinguishing if they always apply?

11 Section § 2G2.2’s deficiencies have not gone unnoticed by courts. The Ninth
12 Circuit agreed in *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011), where it said
13 “the child pornography Guidelines were not developed in a manner ‘exemplify[ing]
14 the [Sentencing] Commission’s exercise of its characteristic institutional role.” *Id.* at
15 960 (quoting *Kimbrough*, 552 U.S. at 109). Thus, “district judges must enjoy the same
16 liberty to depart from them based on reasonable policy disagreement as they do from
17 the crack-cocaine Guidelines.” *Id.* The child-pornography guidelines “have been
18 substantively revised *nine* times during their 23 years of existence,” and with “[m]ost
19 of the revisions [] Congressionally-mandated and *not* the result of an empirical study.”
Id. at 963 (emphasis added). In other words, this guideline is based on not much at all.

1 The Ninth Circuit is not alone. The Second Circuit has called § 2G2.2's
2 enhancements "run-of-the-mill" and "all-but-inherent." *See U.S. v. Jenkins*, 854 F.3d
3 181, 189 (2d Cir. 2017) (citing *U.S. v. Dorvee*, 616 F.3d 174, 186 (2d Cir. 2010)). It is
4 these type of baseless enhancements that cause a routine downloading-defendant "to
5 be treated like an offender who seduced and photographed a child and distributed the
6 photographs and worse than one who raped a child." *Id.* at 189. The Sentencing
7 Commission has been forced by political fiat to increase these guidelines "despite often
8 openly opposing these [c]ongressionally directed changes." *Id.* at 188. The Second
9 Circuit put it bluntly: "the Commission has effectively disavowed § 2G2.2" which
10 "can easily generate unreasonable results." *Id.* at 190.

11 Perhaps more absurd, Mr. Merrill's guideline range for *receipt* exceeds the
12 statutory maximum for *possession*—even though nobody can intelligently explain how
13 *receipt* differs from *possession*, the crimes are in practice indistinguishable. And that is
14 not a defense position, that is the Sentencing Commission's position. According to the
15 a key commission report on sexual offenses, there is "little meaningful distinction"
16 between the two:⁷

17
18
19

⁷ U.S. Sent. Comm'n, *Mandatory Minimum Penalties for Sex Offenses in the Federal Criminal System*
at 5 (Jan. 2019) (available at: <https://bit.ly/31XUd5g>).

Key Findings

5. Although Commission analysis has demonstrated that there is little meaningful distinction between the conduct involved in receipt and possession offenses, the average sentence for offenders convicted of a receipt offense, which carries a five-year mandatory minimum penalty, is substantially longer than the average sentence for offenders convicted of a possession offense, which carries no mandatory minimum penalty.

Despite the lack of any meaningful difference between *possession* and *receipt*, Mr. Merrill faces a range for the latter that would be illegal under the former.

These sorts of arbitrary numbers are offensive to any reasoned system of law and punishment. The fact that § 2G2.2 continues to haunt the guideline manual speaks only to the Sentencing Commission's institutional paralysis (or its remarkably DOJ-friendly history).

B. The Sentencing Reform Act favors a 60-month sentence.

Lengthy prison sentences do not deter crime. So says DOJ. In 2016, the National Institute of Justice, an arm of DOJ, published research findings entitled *Five Things About Deterrence*, which concluded: "Increasing the severity of punishment does little to deter crime."⁸ The reason is common sense: "[laws] increasing the severity of

⁸ Dept. of Justice, Nat'l Instit. of Just., *Five Things About Deterrence* (May 2016) (available at: <https://bit.ly/2XA9g2s>) ("NIJ's 'Five Things About Deterrence' summarizes a large body of research related to deterrence of crime into five points.").

punishment are ineffective partly because criminals know little about the sanctions for specific crimes.”⁹

While harsh sentences generate no deterrence, there is a way to deter offenders: probation. It is the “certainty of being caught [that] is a vastly more powerful deterrent than the punishment,”¹⁰ and nothing provides more certainty of being caught than a probation officer that can search your home or phone. Probation works. Prison does not.

Judges seem to agree. In 2019, judges gave below guideline sentences in nearly 70% of cases.¹¹

Table 31													
SENTENCE IMPOSED RELATIVE TO THE GUIDELINE RANGE BY TYPE OF CRIME ¹ Fiscal Year 2019													
TYPE OF CRIME	TOTAL	WITHIN GUIDELINE RANGE		UPWARD		DEPARTURE				DOWNWARD		VARIANCE	
		N	%	N	%	§5K1.1		§5K3.1				N	%
TOTAL	76,034	39,078	51.4	364	0.5	7,272	9.6	7,119	9.4	3,162	4.2	19,039	25.0
Administration of Justice	695	357	51.4	12	1.7	36	5.2	6	0.9	43	6.2	241	34.7
Antitrust	20	2	10.0	0	0.0	15	75.0	0	0.0	0	0.0	3	15.0
Arson	68	35	51.5	2	2.9	9	13.2	0	0.0	2	2.9	20	29.4
Assault	768	380	49.5	18	2.3	39	5.1	1	0.1	55	7.2	275	35.8
Bribery/Corruption	341	63	18.5	0	0.0	118	34.6	0	0.0	27	7.9	133	39.0
Burglary/Trespass	64	40	62.5	1	1.6	1	1.6	0	0.0	2	3.1	20	31.3
Child Pornography	1,368	413	30.2	10	0.7	30	2.2	0	0.0	95	6.9	820	59.9

⁹ *Id.*

¹⁰ *Id.*

¹¹ See U.S. Sentencing Commission, *Sourcebook*, Table 31 (2019) (available at: <https://bit.ly/3jKOLKL>).

It is no accident that, like Mr. Merrill, virtually every child-pornography download defendant that appears before the Court has mental-health issues often combined with drug use. Those ailments drive crimes of many sorts, and mental-health and drug treatment, not prison, best address the roots of crime.

A five-year sentence followed by five-years of supervision puts Mr. Merrill into the federal system for a decade. That is a sufficient penalty for his offense.

IV. CONCLUSION

For the reasons above, Mr. Merrill respectfully requests a five-year sentence followed by five-years supervised release.

1 Dated: September 3, 2020.

2 Federal Defenders of Eastern Washington & Idaho
3 Attorneys for Christopher Merrill

4 s/Colin G. Prince

5 Colin G. Prince, WSBA No. 43166

6 10 North Post Street, Suite 700

7 Spokane, Washington 99201

8 t: (509) 624-7606

9 f: (509) 747-3539

10 Colin_Prince@fd.org

SERVICE CERTIFICATE

I certify that on September 3, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will notify Assistant United States Attorneys: Ann Wick.

s/Colin G. Prince

Colin G. Prince, WSBA No. 43166

10 North Post Street, Suite 700

Spokane, Washington 99201

t: (509) 624-7606

f: (509) 747-3539

Colin_Prince@fd.org